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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976
No. 76-910

EDWIN K. WILLIAMS & CO. — EAST, INC. AND MARCOIN, INC.

Petitioners,

vs.

EDWIN K. WILLIAMS & CO., INC., KEMP PRINTING CO. AND MRS. E. K. WILLIAMS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION

DONALD C. SMALTZ
523 West Sixth Street, Suite 440
Los Angeles, California 90014
Telephone (213) 625-1666
Attorney for Respondents,
EDWIN K. WILLIAMS & CO., INC.
AND MRS. E. K. WILLIAMS

HARLAN P. HUEBNER
900 Wilshire Blvd., Suite 1000
Los Angeles, California 90017
Telephone (213) 626-7766
Attorney for Respondent
KEMP PRINTING CO.

Of Counsel:
Law Offices of DONALD C. SMALTZ
MICHAEL D. SCOTT
523 West Sixth Street, Suite 440
Los Angeles, California 90014

HUEBNER & WORREL
900 Wilshire Boulevard, Suite 1000
Los Angeles, California 90017

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OPINION BELOW

The decision of the District Court (Pet. App. 23-45)[1] is reported at 377 F. Supp. 418. The opinion of the Ninth Circuit Court of Appeals (Pet. App. 1-23), affirming and reversing in part the judgment of the District Court, is reported at 542 F.2d 1053.

On November 17, 1976, the Court of Appeals denied a petition for rehearing and suggestion for rehearing *en banc.*

[1] The following abbreviations are used in this brief. "Pet." for Petition for Writ of certiorari; "Pet.App." for Appendix of Petition; "Res.App." for Appendix of this brief; "R.T." for Reporter's Transcript; "C.T." for Clerk's Transcript; "DX" for Petitioner's exhibits received in evidence at trial "Ex." for Respondent's exhibits received in evidence at trial.

JURISDICTION

The jurisdiction requisites are adequately set forth in the Petition (Pet. 2).

QUESTIONS PRESENTED

1. Whether a license agreement, whereby the licensee is granted the exclusive right to use the licensor's trade name, trademarks, copyrighted materials and methods, and designated as the exclusive representative for the licensor's services and copyrighted publications in a specific geographic area, violates Section 1 of the Sherman Act?

2. Whether record keeping books which convey information, instruct the user as to the proper methods of assembling and recording daily and monthly financial transactions, provide a means for so doing, and instruct the user how to operate his business, are copyrightable?

STATUTES INVOLVED

Section 1 of the Sherman Act (15 U.S.C. § 1) and Section 1 of the Copyright Law (17 U.S.C. § 1), are set forth at pages 2-7 of the Petition.

COUNTERSTATEMENT OF THE CASE

This case is a franchisor-franchisee dispute. However, unlike many cases in which this Court is petitioned to review a contract alleged to be illegal under the antitrust laws, it does *not* involve the termination by a franchisor of a franchisee's agreement. Rather, it concerns the franchisee's unannounced unilateral repudiation of a contract (entered into 3½ years earlier) at a time when it was convenient to the franchisee and the matter was *sub judice*.

The factual assertions upon which Petitioners' claims of illegality are based do not find any support in the voluminous record of the proceedings below, and are contrary to the findings and conclusions of the trial and circuit courts. In order to put the issues in their proper factual perspective, we set forth the following facts which were adduced at trial and found to be the uncontrovertible facts by both the trial and appellate courts.

A. Respondent, Edwin K. Williams & Co., and its Business.

Since 1935, Edwin K. Williams & Co. ("Williams Company") has been in the business of designing and providing record keeping books for oil companies and service station dealers, and bookkeeping management services for service station dealers.[2] The business management service is a financial counseling service developed by the Williams Company and rendered by individual licensees operating under the Edwin K. Williams & Co. name. The licensee analyzes the service station dealer's monthly and yearly financial records, prepares operating

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[2] The founder of respondent, Mr. Edwin K. Williams, began business as a sole proprietor in 1935 when he developed and designed a single, comprehensive instruction and record keeping book for unsophisticated service station dealers. In conjunction with these books, Mr. Williams furnished counseling to aid the service station dealers in their record keeping, inventory control and general operation of their businesses. (Ex. 1-D, 2895, 947) (R.T. 713, 1892) At first, Mr. Williams peddled books to individual dealers out of the back seat of his automobile. In 1936, he succeeded in making his first sale to a major oil company. The purchase by the oil company was significant because, once the oil company purchased his record keeping books, it then recommended the books to its dealers. (R.T. 808-809) Upon gaining acceptance of his product at the dealer level and by a major oil company, Mr. Williams was able to convince other oil companies to utilize his bookkeeping system.

In 1945, Mr. Williams appointed his first licensee to render those counseling services to dealers; and thereafter, Mr. Williams incorporated his sole proprietorship into a company named Edwin K. Williams & Co.

statements, and advises the dealer of problems in his business and how to correct them, all with a view toward making the dealer's operation more profitable. The Williams Company's record keeping books provide the primary documents from which the independent licensee is able to render business management services to the dealer at relatively low cost. While the dealer can use the books without the services, generally he does not use the service without the books.

Until 1952, Williams Company directly licensed the licensee to perform counseling services. In 1952, Williams Company began to operate through various regional representatives. Each representative had a specific geographic territory in which he was responsible for placing licensees, developing and maintaining contacts with oil companies headquartered in that area, and soliciting orders for Williams Company's publications. The licensees, in turn, were responsible to the regional representative.

B. Petitioner East's Relationship with the Williams Company.

Fred G. Harris, the predecessor of Edwin K. Williams & Co.-East ("East"), personally worked for Mr. Williams in Los Angeles from 1946 to 1949. In 1949, Mr. Williams and Harris parted company. Harris ultimately entered the Navy and was assigned to the Washington, D.C., area from 1949 to 1952.

In 1952, while Harris was still in the Navy, he and Mr. Williams entered into an agreement (the "1952 Agreement") whereby Harris became the Eastern Representative of the Williams Company in the states east of the

Mississippi River. The Williams Company turned over to Harris the accounts it had developed in the eastern states, along with the goodwill, and Harris agreed to "use his best efforts to develop said eastern territory and to maintain the goodwill of the companies now using [Mr. Williams'] books and systems." (Pet. App. 23-25) Harris acquired the exclusive right to "sell, market and promote all bookkeeping systems, forms, books and methods" in the east under the name used by the Williams Company. Harris was required to forward to the Williams Company orders for books, and he received a commission on the orders he placed in that territory. Harris obtained the right to market under his own name or under the names used by the Williams Company, and the right to set up sublicensees to perform the bookkeeping services. Harris was required to pay to the Williams Company 30% of the gross revenues from these sublicensees. (Pet. App. 3-4) As found by the District Court, the relationship whereby Harris became Williams' eastern representative "all began with Harris being little more than an order-taker for Williams." (Pet. App. 30)

From the outset in 1952, Harris operated as "Fred G. Harris Company, Eastern Representative of Edwin K. Williams & Co.," and continuously held himself out to the trade as being "under an exclusive license agreement to use the Edwin K. Williams & Co. name, know-how, forms, methods, etc." (Ex. 55, pp. 2-3)

Harris' initial efforts as Williams Company's eastern representative met with limited results, as he was unable to properly develop the eastern territory.[3] In 1955, Mr. Williams threatened to cancel their agreement unless

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[3] After 3½ years, Harris was only able to acquire one new oil company account and had only 4 licensee offices.

Harris could better develop the area. In 1956 and 1959, Harris' territory was reduced.[4]

In 1963, Harris and a business partner whom he had acquired in 1954 formed the Fred G. Harris Corporation as successor to their partnership. In 1964, the corporation changed its name to Edwin K. Williams & Co. (Va.) and in 1968 to Edwin K. Williams & Co. - East.

From 1952 through 1972, Harris and the successor partnership and corporations (now East), pursuant to its license, continuously utilized respondents' trade name, service marks, trademarks, business materials, assistance, direction, advice and help in developing the eastern territory. East was developed as part of and not separately from the Williams Company's national organization and continually identified itself as "part of the worldwide organization [Edwin K. Williams & Co.] which produces the dealer record system for over 30 major oil companies, . . . offers a business management service exclusively for service stations to over 40,000 dealer clients each month, . . . [and] has been in this business (only) since 1935." (DX 2354)

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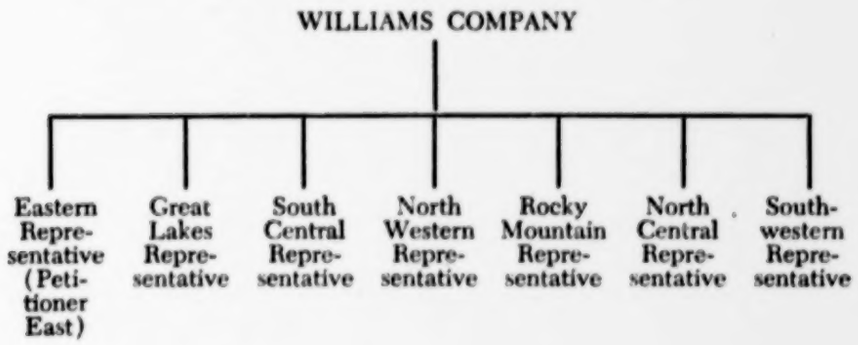
[4] Harris was ultimately one of 7 territorial representatives of Williams. Mr. Williams appointed representatives for the Northwestern states in 1953; South Central states in 1955; North Central states in 1959; Rocky Mountain states in 1961; and, after Mr. Williams' death in 1963, the Southwestern states. (Pet. App. 4) Thus, at the time of the Revised Agreement, the structure of the Williams Company was as follows:



C. The Controlling Contract — The Revised Agreement.

After Mr. Williams' death in 1963, his widow, respondent Mrs. Edwin K. Williams, became president of the Williams Company. Problems with her eastern representative resulted in a lawsuit in 1968 by Williams Company against East for infringement of the Williams Company's trade names and copyrights, money owed by East and various other relief. (Res.App. 1-2) In an effort to resolve all existing disputes, after four days of continuous negotiations, the parties executed a settlement agreement and the Revised Agreement on July 22, 1968. (Res.App. 1-6 & 7-27)

D. The Commencement of the Litigation

Despite the definitive nature of the 1968 settlement, each party shortly thereafter disputed the other's interpretations of their rights and duties. After respondents' efforts to resolve the differences failed, respondents filed suit for, *inter alia*, declarative relief in August, 1970.

On January 8, 1971, East answered and, thereafter, filed an amended answer and counterclaims against respondents, Edwin K. Williams & Co., Mrs. Edwin K. Williams (president and sole shareholder of respondent), and Kemp Printing Co.[5] East's amended answer and counterclaim alleged that the Revised Agreement was now violative of the antitrust laws because it allegedly was between "competitors." Further, that the copyrights on certain of Williams Company's materials were now void. The suit temporarily abated between April, 1971 and January 11, 1972, while the parties conducted settlement negotiations. During these negotiations, the parties' conduct was governed by a stipulated court order which required the parties to act in accord-

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[5] Kemp, a California corporation, was 70% owned by Mrs. Williams, and printed the record keeping books and other materials utilized by the Williams Company and its licensees.

ance with the Revised Agreement during negotiations. (C.T. 1338-1349)

On January 11, 1972, the stipulation expired and settlement negotiations ceased. On February 29, 1972, during the course of discovery proceedings, Williams Company first learned that East was no longer operating pursuant to the Revised Agreement, but rather, had some 6 weeks before secretly repudiated it and had transferred its key employees to Petitioner Marcoin.[6]

E. Petitioners' Surreptitious Repudiation of the Revised Agreement.

Without announcing to anyone that it had repudiated the Revised Agreement, East's and Marcoin's officers (they were the same) on January 14, 1972, began soliciting orders from various oil company customers whom East had serviced as Williams Company's representative. East solicited and received orders for 14,000 book sets of Williams' record keeping books from three major oil companies, without informing any of these customers that they were no longer Williams' representative. Each of these customers believed that they were ordering Williams Company's publications, and the purchase orders noted that the books were to be printed by *"Williams Printing Company."* This printing company was not connected with or related to respondent in any way — except it had the same name.[7]

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[6] Marcoin had been created in 1969 by the officers of East and shortly thereafter East became Marcoin's wholly-owned subsidiary.

[7] Williams Company first learned of the repudiation on February 29, 1972, after the orders were obtained, while Williams was deposing one of East's officers. No officer of either Marcoin or East (and each officer of East held a corresponding official position with Marcoin, and vice versa) knew the date when the repudiation occurred, and no documentation could be found in the corporate minutes of either organization which reflected the date of the repudiation or that it was in fact made at all. The repudiation was described by Marcoin as a "reorganization" that "was commenced in 1971." (Ex. 3103) According to Harris (East's founder and vice president at time of trial, and chairman of the board of Marcoin), the justification for the repudiation was that, since the Williams Company and East couldn't agree to a merger in 1971, East and Marcoin decided to repudiate the agreement. (R.T. 1822) (Ex. 3109) The court found that the repudiation "was inexcusable . . . [and] the placing in operation of a long-wished-for severance on the part of defendant Williams-East, all under the guidance of Marcoin." (Pet. App. 43)

Williams Company moved for injunctive relief and was ultimately granted an injunction prohibiting East and Marcoin from utilizing the Williams trade name and representing in East's publication that the printing was being done by the *Williams Printing Company.*

Williams Company then began to rebuild its eastern organization since it no longer was represented in the eastern 22-state area. (R.T.314-315) East and Marcoin tried to thwart these efforts by attempting to convince the industry that the Williams Company was changing its name to Marcoin,[8] and as a result, confusion was rampant both at the oil company and dealer levels.

In June, 1972, Williams Company filed a supplemental complaint seeking damages and injunctive relief for breach of contract, infringement of copyright, false designation of origin, trade name infringement, unfair competition and interference with contractual business relations. (C.T. 971-988) East filed supplemental counterclaims realleging their previous contentions.

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[8] First, they issued a series of joint letter announcements to the trade stating that Edwin K. Williams & Co. — East was changing its name to Marcoin. The announcement did not state or imply that East was no longer a representative of the Williams Company. These letters were followed by ads placed in trade journals and press releases in various publications, which only informed the public of the name change, stating that East and Marcoin would be offering the same goods and services under the Marcoin name.

F. The Trial and Appeal.

Trial commenced on January 2, 1974, before the Honorable David W. Williams, a jury having been waived. It ended on February 19, 1974. During the course of the seven-week trial, the court heard testimony from 18 live witnesses, received in evidence over 4,000 pages of exhibits, and deposition testimony of 16 deponents totalling over 2,600 pages with hundreds of exhibits. (Pet. App. 10)

The trial court found that the Revised Agreement was a valid trade name and copyright license and not violative of the Sherman Act; that the copyrights were valid; and that East and Marcoin committed trade name infringement. The Judgment (C.T. 2471-2487) awarded damages against East to Williams Company for breach of contract and tortious acts in the amount of $586,721.51, and against Marcoin for copyright infringement in the amount of $6,212.00. East and Marcoin were permanently enjoined from using the logos and trade name of Edwin K. Williams, or variations thereof, and from representing in any fashion that they were representatives of the Williams Company and from infringing Williams Company's copyrights. (C.T. 2484, 2485)

The Ninth Circuit Court of Appeals affirmed the holding of the opinion of the District Court except that it held the full amount of the judgment binding against Marcoin, as well as East. (Pet. App. 23)

ARGUMENT

THIS COURT SHOULD NOT GRANT A WRIT OF CERTIORARI TO REVIEW FACTUAL DETERMINATIONS MADE BY THE TRIAL COURT AND AFFIRMED BY THE COURT OF APPEALS.

No matter how Petitioners frame the issues, this case must be decided on its facts. Petitioners' efforts to

create issues for review purposes lead them to ignore not only the facts of this case, but also the facts and holdings of those decisions which they cite in support of their arguments. In adopting this tactic, Petitioners have demonstrated their conscious disregard of this Court's admonition that:

> "[E]ach case arising under the Sherman Act must be determined upon the particular facts disclosed by the record, and that the opinions in those cases must be read in the light of their facts and of a clear recognition of the essential differences in the facts of those cases, and in the facts of any new case to which the rule of earlier decisions is to be applied. *Maple Flooring Mfgr's. Assn. v. United States*, 258 U.S. 563, 579 (1925).

A. The Decision of the Court Below Is Not In Conflict With This Court's Holdings in Sealy, Topco and Timken.

Petitioners' argument on this point begins with the premise that, since Petitioners and Respondent competed with each other after Petitioners' repudiation of the Revised Agreement, "East and West [Williams Company] were competitors but for the Revised Agreement." Petitioners thus contend that the decision of the court below conflicts with *Sealy, Topco* and *Timken*. (Pet. 25, 26) This argument is a non sequitur.

At trial, Petitioners' founder and the chairman of the board of Marcoin, Fred Harris, testified that East did not become a competitor of Williams in any way until "when we terminated the Revised Agreement or shortly around that time." (R.T. 1536, 1537) The voluminous evidence concerning the historical relationship between the parties unequivocally established that East, throughout the 19 years it was Williams' eastern representative, had been a part of the Williams Company, utilized Wil-

liams' trade names, copyrights, service marks, business materials, and was developed as part of, and not separately from, the Williams Company.

East insists upon fabricating a competitive relationship on the theory that if it can establish that it was a "co-equal," *ergo* it was a competitor. That is not what the evidence at trial disclosed.[9]

Viewing the relationship of Williams and East under the Revised Agreement in the context of a national organizational structure, there were three tiers. These tiers were:

(1) The Williams Company, the owner of the trade name, trademarks and copyrights, and licensor of its bookkeeping service counseling, and seminars, and publisher of its record keeping books.

(2) The seven regional representatives, including East.

(3) The licensees, consisting of independent businessmen directly licensed by the Williams Company to render counseling to service station dealers (except in the east where sublicenses were issued through East).

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[9] Petitioners contend that they were competitors because they operated at the same functional level prior to the repudiation (Pet. App. 26) That assertion is wrong. *First*, no representative – including East – sold the books; rather, all representatives solicited orders for the books and forwarded them to Williams who approved their format and had them printed, and the representatives received a commission. *Second*, Williams Company did not perform the bookkeeping services and counseling for the service station dealers; its licensees did. East had both sublicensees (as had some other representatives of Williams) and branch offices that did such bookkeeping services and counseling. *Third*, Williams' services were conducted by a wholly-owned subsidiary, the Edwin K. Williams Management Institute, Inc.; they were not performed by Williams. Williams referred inquiries for seminars to East and to the Management Institute.

Different duties and functions were provided by the three tiers of the Williams Company. Williams was the licensor of the independent businessmen who furnished, under the Williams name and banner, the Williams' business counseling and financial management services to service station dealers. In return, the licensee paid a commission to Williams, computed on a percentage of its gross sales — except in the east where Williams was to receive 30% of the gross monthly revenue paid to East by its sublicensees and branch offices. (Res.App. 16, Art. VIII-D) Throughout its 22-state territory by the terms of the Revised Agreement, East was granted:

> ". . . the sale, franchise and use of the services, publications, and systems developed by Williams, the licensing of licensees, the operation of branch offices, the promotion of said services, publications and systems with licensees, service stations and oil companies, the right to print forms developed by Williams, . . . the right to utilize and to license others to utilize the trade names and trademarks used by Williams, and to exploit the copyrighted material of Williams as well as other copyrighted material derived therefrom, and the right to conduct seminars and business management or sales programs in conjunction with oil company or service station management.***" (Article III-A, Res.App. 9-10)

The trial court's finding that "[n]owhere in this record is there room for the finding that these were two separate and independent business houses . . . who were competitors (or in any antitrust sense potential competitors) with one another" (Pet.App.31) is abundantly correct.[10]

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[10] Petitioners' claim that "[t]he Ninth Circuit opinion concedes that fact," *i.e.*, that Williams and East were competitors (Pet. 26) not only distorts the record, since Harris at the time he signed the 1952 agreement was still in the Navy and was not even in business, but also distorts the context in which the phrase was used in the opinion. The opinion states only that in

Petitioners' reliance on *United States v. Sealy, Inc.*, 388 U.S. 350 (1967), and *United States v. Topco Assoc.*, 405 U.S. 596 (1972), as support for their assertions that East must be deemed a horizontal competitor is misplaced. Petitioners' reference ignores critical facts present in *Sealy* and *Topco*, but absent in this case, *viz.*, that the licensees in each controlled the purported licensor. In both *Sealy* and *Topco*, the licensor was no more than the creation of the licensees, and in both cases the licensees comprised the board of directors of the licensor, and thus were able to control and operate the everyday business affairs of the purported licensor. These determinative facts are absent in this case, as the evidence concerning the sole control all pointed in one direction — from Williams over East — and there were no elements of reverse control. Thus, the trial court properly found that, "[i]n the case at bar there exists a measure of control by the licensor over the licensees, however there is no feature of reverse control whereby the licensees, as compelled or permitted stockholders in the parent company, or officers thereof, have control over the operations of Williams-West." (Pet. App. 35)

East's contention that under the test of *United States v. Jos. Schlitz Brewing Co.*, 253 F. Supp. 129 (N.D. Cal.), *aff'd per curiam*, 385 U.S. 37 (1966), Williams Company and East were competitors, is woefully misplaced.[11] Evi-

1952 Harris was "a potential competitor prior to the time he signed the agreement." Obviously, the court was using the term "potential competitor" in the sense that anyone in the world could be a potential competitor of any business if he decides to start a business in competition with it. The Circuit Court held that only in seminars could Williams and East be potential competitors. (Pet. App. 17)

[11] In *Schlitz*, the two companies, Labatt and Burgermeister (which Schlitz had acquired) were existing, viable, independent competitors of Schlitz, offering their respective products under their own labels in the same market prior to the acquisition.

dence here established that under the Revised Agreement East was neither a *de facto* competitor, per *Schlitz*, nor a *de jure* competitor, per *Sealy*. The trial court so found, and that finding is proper under the facts of this case.[12]

Petitioners also urge (Pet. 25-27) that the decision below conflicts with this Court's decision in *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951). That decision condemned a system of trademark licensing adopted by an international cartel to divide world markets. It is cited apparently for the proposition that trademark licensing systems are not immune from antitrust scrutiny. (Pet. 26-27) Nothing in the decision below is to the contrary.

B. The Decision Below on the Issue of Territorial Restraints Does Not Conflict With This Court's Decision in Schwinn, Nor the Decisions of Other Circuits.

The courts below determined that, under the facts of this case, there was a vertical rather than a horizontal arrangement, and that "the Revised Agreement requires . . . [East] as the exclusive representative of . . . [Williams,] to conduct its operations in a confined area to maximize the benefits from the use of Williams' copyrighted publications and trade names." (Pet. App. 18, 35,

[12] Contrary to Petitioners' assertions, *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975), does not conflict with the analysis of the court below, but rather is in total accord. Holiday Inns had a procedure whereby, when it received a request for a new franchise, it would send notice of same to the three closest existing Holiday Inns. If any one of the three objected, the proposed franchise would not be issued. The court there recognized that this procedure permitted existing franchisees to control the licenses and to determine and control the extent of competition. It found the effect to be "similar to practice which the Supreme Court determined to be *per se* unlawful in *United States v. Topco Assoc.*" *Id.*, 1242. The court observed that if Holiday Inns had made the decision unilaterally, rather than in concert with the licensees, it may have been lawful as falling within the vertical restraints in *Schwinn*. *Id.*, at 1243.

36, 39) That holding is correct under the facts of this case and does not deviate from nor conflict with this Court's holding in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) or decisions in other circuits.

Schwinn did not impair a manufacturer's "recognized privilege of designating a territorial area as an exclusive market of a franchisee and of assuring him that he alone in this area would receive shipments from the franchisor of the branded merchandise." FTC Staff Report on Franchising (1969), CCH Trade Reg. Rep. ¶ 444. Vertical territorial and customer restraints have been upheld in a wide variety of situations under the test of *Schwinn*.[13]

1. The Court below Correctly Determined That the Restraints Imposed on East by the Revised Agreement Were Both Valid and Reasonable.

Petitioners' claim that the Court of Appeals "erroneously held the restraints on competition prohibited in *Schwinn*, are not applicable to service industries or trade name licensees."[14] (Pet. 16) Whatever petitioners mean by this statement, it is clear that the Circuit did not so hold. The Ninth Circuit held only that in light of the facts of this case, *Schwinn* was inapplicable to the book-

[13] *See, e.g., Colorado Pump & Supply Co. v. Febco, Inc.*, 472 F.2d 637 (10th Cir.), *cert. denied* 411 U.S. 987 (1973); *Anderson v. American Auto. Ass'n.*, 454 F.2d 1240, 1246 (9th Cir. 1972); *Tripoli Co. v. Wella Corp.*, 425 F.2d 932, 936 (3d Cir.), *cert. denied*, 400 U.S. 831 (1970); *Janel Sales Corp. v. Lanvin Parfums, Inc.*, 396 F.2d 398, 406 (2d Cir.), *cert. denied*, 393 U.S. 938 (1968); *Carter-Wallace, Inc. v. United States*, 449 F.2d 1374, 1380 (Ct. of Cl. 1971); *National Dairy Prod. Corp. v. Milk Drivers & Dairy Emp. Union*, 308 F.Supp. 982 (S.D.N.Y. 1970).

[14] As the Court said in *Schwinn*:

> "We conclude that the proper application of § 1 of the Sherman Act *to this problem* requires differentiation between the situation where the manufacturer parts with title, dominion, or risk with respect to the articles, and where he completely retains ownership and risk of loss." (*Id.* at 1865; emphasis added)

keeping counseling and the seminars. (Pet. App. 18) The books,[15] bookkeeping counseling and seminars are each an interrelated part of Williams Company's business. (Pet.App. 17) The bookkeeping services involve the individualized counseling of a service station dealer by a Williams licensee, which assists that dealer in resolving his particular business problems. The dealer is given a detailed monthly review and analysis of the data recorded by him in Williams Company's copyrighted books, and financial management counseling with regard to inventory control and proper business objectives. These services are rendered by a licensee who has been trained in and utilizes the methods of the Williams Company and provides these services under the "Edwin K. Williams & Co." name.

Similarly, the seminars instruct oil company executives in the essential elements of its dealers' problems in bookkeeping, inventory control and financial management. In seminars, the input, the daily record keeping books, the inventory control, and other methods designed by Williams Company to insure proper financial management are taught to oil company personnel. They, in turn, assist the dealer in his financial management problems. The seminar[16] is designed to inform the oil company personnel how to better understand the operations and problems of the dealer and how to communicate effectively

[15] As to the books, the evidence established that East merely solicited orders from customers, which customers then ordered the books directly from Williams and paid Williams directly. (Pet. App. 6, 30) Thus, the *Schwinn* doctrine was held inapplicable to the book phase of the business. (Pet. App. 18) Petitioners do not claim error on this issue.

[16] The seminar materials introduced in evidence by East, as well as those of Williams, contain voluminous references to the Williams' methods, the Williams' copyrighted materials, the Williams' systems, including the daily sheets which are part and parcel of the record keeping books, all of which are used in the training programs for the seminars.

with that dealer in regard to maximizing the potential profit and efficiency of the dealer's station.

The entire Edwin K. Williams method culminates in the effective utilization, for intelligent financial management, of the data recorded in the Williams Company's copyrighted record keeping books. While each of the Williams Company's services and products might be viewed independently in the abstract, in practice they are all uniquely related to one another and, in combination, provide the complete Williams' method of teaching and intelligent financial management to the oil industry.[17] Thus, the Circuit Court's holding that the territorial restrictions on seminars (Art. III-A, V-C, XII of the Revised Agreement, Res. App. 9-10, 12-13, 19-20) were "reasonable restraints ancillary to [Williams'] purpose of protecting its trade names and copyrights," is in accordance with established precedent. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd.* 175 U.S. 211 (1899); *United States v. Columbia Pictures Corp.*, 189 F. Supp. 153, 178 (S.D.N.Y. 1960).

These personal services offered under Williams trade name are clearly not tangible commodities.[18] Unlike a can of beer, a bicycle, or a television set, their quality is not and cannot be controlled at the manufacturing facility; and, Petitioners' contention notwithstanding, it makes no sense to discuss "title, dominion or risk" in

[17] The oil companies desire regional and national standardization of all the services and products that they purchase or endorse for their dealers. The approval of a particular system is generally given at the national headquarters of the oil company. However, the seminars are generally geared to specific regions, because dealer problems differ in various parts of the country, *e.g.*, the ratios of gasoline to TBA and antifreeze of a dealer in Florida are significantly different from those of a dealer in Maine.

[18] Like trademarks, trade names are not "a right in gross or at large . . . There is no such thing as property in a trademark except as a right appurtenant to an established business or trade in connection with which the mark is employed." *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 97 (1918).

relation to personal services. *Schwinn* was not concerned with services, but with an entirely different problem — one of control over tangible goods.

Contrary to Petitioners' claims, the Revised Agreement was not an absolute allocation of territories and customers. Under its terms, East was *not* prevented from soliciting orders for Williams' copyrighted books within its territory, if the books were ultimately to be delivered outside East's territory. In fact, the Revised Agreement specifically recognized this right and provided that East was to receive a commission on *all* orders received from oil companies within its territory, even though the books ordered were ultimately sold to service station purchasers outside East's territory. (Revised Agreement, ¶ VIII-A, B, Res. App. 15-16) Similarly, if a customer from the west desired to attend a seminar sponsored by East within its territory, there was no restriction against East permitting such attendance. Intrabrand competition was *not* foreclosed. (Revised Agreement, ¶ XII-A, B, Res.App. 19)

There were *no* customer restrictions within East's assigned area in the 22 eastern states, and East's duty was to develop that territory to the fullest. (Revised Agreement, ¶ VI-A, Res. App. 13-14) The record below is replete with evidence that the Williams Company's name, trademarks, publication and methodology had over the years come to represent the existence of a national system of experts in the area of financial management for service station dealers. What East was not licensed to do was to utilize the Williams name, trademark services, and materials outside of that designated territory.[19] (Revised Agreement ¶ III-A, V-A, C, Res. App. 9-10, 12-13)

[19] Despite the contentions made by Petitioners of the supposed Sherman Act illegalities of the Revised Agreement, East imposed and is still imposing the same restrictions in its contracts with its licensees that it complains are illegal when imposed upon it. *See* Ex. 1410 (1966 sublicensee contract) and DX-2070 (1972 sublicensee contract).

In its Petition East, for the first time in this litigation,[20] cites Section 3 of the Clayton Act (Pet. 3) and argues that the court below failed to apply *Standard Oil of California v. United States,* 377 U.S. 293 (1949), and approved a vertically imposed restraint which substantially foreclosed interbrand competition. (Pet. 20-22) Respondents do not understand the relevance of Clayton 3 to this case, since Clayton 3 on its face involves "goods, wares, merchandise, machinery, supplies or other commodities." It does not apply and has never been applied to services. *Capital Temporaries, Inc. v. Olsten Corp.,* 506 F.2d 658, 666 (2d Cir. 1974).

Moreover, East's argument that, because "interbrand competition was foreclosed," the combination of Clayton 3, *Standard Stations* and lack of interbrand competition rise to a Sherman 1 violation (Pet. 21), is specious. The argument not only misstates the law[21] and the facts, but ignores the realities of the marketplace. By the terms of the Revised Agreement, East, as Williams

[20] Before the District Court, petitioners did allege that a tying arrangement existed, in that the Revised Agreement forced East "to accept something it does not want (a system of customer and territorial allocations, together with the payment to plaintiff) in order to get something that Williams-East does want (plaintiff's copyrighted record keeping books)." (Pet. App. 39) Petitioners did not raise the tying issue in their brief to the Circuit Court and, accordingly, abandoned it.

[21] A holder of a copyright, trademark, trade name or service mark may grant to a licensee the right to use any one of these items in a designated geographical territory. *Susser v. Carvel Corp.,* 332 F.2d 505, 519 (2d Cir. 1964), *cert. dism.* 381 U.S. 125 (1965); *Jack Winter, Inc. v. Koratron, Inc.,* 375 F. Supp. 1, 63 (N.D. Cal. 1974).

The holder of a copyright similarly may grant exclusive license to others for the sale or distribution of the copyright material. See *United States v. General Elec. Co.,* 272 U.S. 476 (1926); *Interstate Circuit v. United States,* 306 U.S. 208 (1938); *Lawlor v. National Screen Serv.,* 270 F.2d 146 (3rd Cir. 1959). This principle is consonant with the provisions of the copyright law which provide that a copyright holder shall have the exclusive right to print, publish, copy and vend the copyrighted work. 17 U.S.C. 1.

Company's *exclusive licensee* in the eastern area was required, "should it enter into any activities not related to the Operation, the petroleum industry, oil companies or service stations," to act through a separate corporation. East, through Marcoin, did enter into various other activities[22] which, according to Petitioners in the court below, was the very reason for the formation of Marcoin.

The consequences of an exclusive licensee selling a variety of competing personal services under one licensor's name are too obvious to require discussion. That objective, *viz.,* the handling of a competitor's product by East under Williams name, was never discussed, desired, expressed or requested by East.

Were East's arguments accepted, trade name franchising simply could not and would not be done since once one became a franchisee in one area, he would become licensed in every area. Morever, there would be no way that a licensor could exercise any control whatever over the franchisee since the franchisee would be able to offer virtually any services under the franchisor's marks.[23] This ingenious contention of Petitioners does not merit review.

2. There Is No Conflict Between the Circuits on the Applicability of Schwinn to Trademark Licenses for Personal Service Businesses.

The only case cited by Petitioners on the issue of "conflict in the circuits" is *Response of Carolina, Inc. v.*

[22] Marcoin in fact operated, among other businesses, a printing business which supplied forms and promotional literature to East, an insurance business, an escrow business for service stations, and a company operating in the western area known as Mark-Man. (Pet. App. 8, 32-33)

[23] The licensor's failure to exercise control over the licensee's use of the mark can result in the loss of ownership in the mark. 1 J. McCarthy, *Trademarks and Unfair Competition* (1973), pp. 635-648.

Leasco Response, Inc., 537 F.2d 1307 (5th Cir. 1976) ("*Response*"). Unlike the case at bench, *Response* was not concerned with personal services at all, but instead with a business that provided customers with time-shared computer facilities. While the court referred to the business as "computer time-sharing services," what the court was referring to was the computer hardware, systems software, and application software (*id.* at 1326) which are not even remotely akin to the services here involved.[24]

Moreover, the opinion in *Response* does not address itself to that portion of the *Schwinn* opinion discussed in the court below, *viz.*, the applicability *vel non* of the "title, dominion and risk" language of *Schwinn* to these services. Instead, *Schwinn* along with eleven other cases is analyzed on the limited question of whether or not "'firm and resolute' or, at least, some measure of enforcement of a vertical restriction is necessary to rend[er] it actionable." (*Id.* at 1315-1318)

Nowhere in *Response* is the issue of the application of *Schwinn's* "title, dominion and risk" analysis to personal services raised or discussed. There is no conflict between this case and *Response*, as totally different issues were raised and determined in the two cases.

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[24] In *Bunker-Ramo Corp. v. Porterfield*, 21 Ohio St. 2d 321, 257 N.E.2d 365 (1970), the Ohio Supreme Court, when faced with the question of whether computer time-sharing "services" were analogous to personal services, stated:

> "An examination of the record indicates that the activity which the appellee performs is a completely mechanized service transaction. It is not a *personal* service transaction in the sense that there are no people engaged in serving directly the subscribers of appellee. This service is rendered by computers, communication lines and reception and display instruments." (emphasis in original)

C. The Court Below Correctly Found Williams Company's Books Copyrightable and Infringed by East's Publications.

Petitioners are seeking a *de novo* factual hearing in this Court on the question of the copyrightability of, and East's infringement of, Williams Company's books. (*See, e.g.*, Pet. 32, n.24)

Petitioners first claim that Williams Company's books are merely "blank forms" and that, under *Baker v. Selden*, 101 U.S. 99 (1880), and 37 C.F.R. § 202.1, they are not the proper subject of copyright. (Pet. 29-32) Petitioners then claim that:

> "Both the district court and the court of appeals held that the blank forms in West's books were properly the subject of copyright . . . ." (Pet. 29)

This is a misstatement. *Nowhere* did either court claim that "blank forms . . . were properly the subject of copyright." The District Court specifically found that the books were *not* just blank forms, but conveyed information (Pet. App. 41) and, as such, *Baker* was inapplicable. *See also, Cash Dividend Check Corp. v. Davis*, 247 F.2d 458 (9th Cir. 1957) (check forms); *Continental Cas. Co. v. Beardsley*, 253 F.2d 702, 704 (2d Cir. 1958) (insurance forms); *Harcourt, Brace & World, Inc. v. Graphic Controls Corp.*, 327 F. Supp. 517 (S.D.N.Y. 1971) (answer sheets for optical scanning). This finding was a factual determination based upon the trial judge's personal inspection of the books in question, plus hearing lengthy testimony, including the expert testimony of Professor Melville Nimmer. (R.T. 916, 918, 921) Once the trier of fact determined that the books in issue were *not* merely blank forms, there was no reason to apply *Baker*. The trial judge applied the proper rationale in holding that, even if *Baker* is "still good law, . . . it does not come to this defendant's aid." (Pet. App. 41) The Ninth Circuit

also conducted a review of the materials and sustained the District Court's finding that the books "constituted an integrated work entitled to copyright protection." (Pet. App. 16)

With regard to infringements, Petitioners would have this Court sit *nisi prius* and factually determine the similarities between the respective books. (Pet. 32, n.24) This is not the Court's function. *General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 178 (1938).

The trial court determined:

> "[There] is both access and substantial, *if not striking,* similarity between the two book sets.*** With some small rearrangement, the instructions are substantially identical. The sample daily sheet is so *identical* the defendants didn't bother to change the handwritten words and figures used to illustrate the plan. There is sufficient comparison between the arrangements of boxes and columns *to show copying.* Marcoin has not only used plaintiff's system but has used the same ruled lines and headings." (Pet. App. 40-41; emphasis added)

Once the factual determination of access, striking similarity and copying was made, the trial court properly held that East infringed Williams Company's copyrights. *Nimmer on Copyrights,* § 141.2-143.4, pp. 613-634.

CONCLUSION

The Petition requests this Court to reconsider the trial evidence and to find contrary to the evidentiary rulings of the Court of Appeals. The task is obviously not one that should be undertaken by this Court. The holdings of the Court of Appeals are in accord with the applicable prevailing law and compelled by the factual record developed at the trial of the case. Petitioners

have not demonstrated, as they cannot, any meritorious reason why their Petition should be granted.

In an effort to "hitch their wagon to a star," Petitioners urge that this case should be consolidated with *GTE Sylvania, Inc. v. Continental TV, Inc.*, 537 F.2d 980 (9th Cir. 1976), on which certiorari has been granted. Supreme Court Rule 43(5) permits consolidation only for cases "involving the same question." Yet, these cases have virtually nothing in common except for the fact that they both involve vertical territorial restraints and both cite *Schwinn.* The *GTE* case involved a factual situation which the Ninth Circuit held should not be subject to the *per se* rule of *Schwinn.* It found that the *Schwinn* rule should not be "extended to embrace the 'location practices' utilized by Sylvania and others as a method of modern *product* distribution systems." (*GTE*, 537 F.2d at 988; emphasis added) This case is neither concerned with "location clauses" nor "*product* distribution systems." Thus, the question presented by the *GTE* case, *viz.*, whether "location clauses" require application of the *per se* rule of *Schwinn,* is simply not an issue in this case. Consolidation, therefore, would be improper.

For the foregoing reasons, Respondents submit that this Petition should be denied.

Respectfully submitted,

DONALD C. SMALTZ
and
HARLAN P. HUEBNER

January 28, 1977

APPENDIX

1

SETTLEMENT AGREEMENT

I. THE PARTIES

The parties to this Agreement are EDWIN K. WILLIAMS & CO., a California corporation (hereinafter called "Williams"), and EDWIN K. WILLIAMS & CO. (VA.), a Virginia corporation (hereinafter called "Williams — East").

II. RECITALS

A. On April 18, 1968, Williams filed an action against Williams — East in the United States District Court for the Northern District of California, No. 49098, which sought injunctive relief and damages for allegedly incorrect designations of origin and allegedly incorrect description of goods and services, unfair competition, infringement of copyright, infringement of trade name, violation of Sections 6400-6404 of the California Corporations Code, as well as damages for breach of contract and an equitable accounting.

B. On June 24, 1968, Judge George B. Harris of the United States District Court for the Northern District of California denied defendants' motion to quash service of process for lack of jurisdiction and to dismiss for lack of venue, and denied plaintiff's motion for a temporary restraining order, suggesting that the matter be brought to early trial.

C. The parties desire to settle and dispose of the disputes and difficulties arising out of the aforementioned action and matters related thereto, as well as any other disputes and differences resulting from their past business relationships, including but not limited to disputes concerning agreements entered into between Williams and Fred G. Harris dated July 1, 1952, January 2, 1956 and January 1, 1959, to which agreements

Williams — East is the successor in interest to Fred G. Harris, as well as all letter agreements, implied agreements, and oral agreements whatsoever between the parties or their predecessors in interest. This settlement and disposition is to be by means of a Revised Agreement, a copy of which is attached hereto as Exhibit "A", by a Dismissal With Prejudice of the action set forth in Paragraph II. A. hereof, a copy of which dismissal is attached hereto as Exhibit "B", and by entering into this Settlement Agreement.

III. CONSIDERATION

The consideration for this Settlement Agreement shall be the mutual promises by, the benefits flowing to, and the detriments suffered by the parties hereto, including but not limited to the Dismissal With Prejudice attached hereto as Exhibit "B", incorporated by reference and made a part hereof, and the execution and faithful performance by the parties hereto of the Revised Agreement attached hereto as Exhibit "A", incorporated by reference and made a part hereof.

IV. RELEASES

A. Williams hereby releases and forever discharges Williams — East from any and all rights, claims, demands, and causes of action in law or in equity of whatever kind or nature, whether known or unknown, suspected or unsuspected, which it may now have or may have had, arising out of or on account of or in any way connected with or related to the subject matter of the aforesaid action, or any rights under the aforesaid agreements except as such rights may be specifically set forth as continuing rights in the Revised Agreement attached hereto as Exhibit "A".

B. Williams — East hereby releases and forever discharges Williams from any and all rights, claims, de-

mands, and causes of action in law or in equity of whatever kind or nature, whether known or unknown, suspected or unsuspected, which it may now have or may have had, arising out of or on account of or in any way connected with or related to the subject matter of the aforesaid action, or any rights under the aforesaid agreements except as such rights may be specifically set forth as continuing rights in the Revised Agreement attached hereto as Exhibit "A".

V. STIPULATION TO AMEND AND DISMISSAL

The parties agree that:

(1) A stipulation to amend certain language in the complaint shall be filed in the United States District Court for the Northern District of California not later than thirty days from the date of the execution of this Settlement Agreement; the terms of said stipulation shall be agreed upon by the counsel hereunder signed. Williams will not oppose said stipulation and shall execute such stipulation promptly.

(2) The Dismissal With Prejudice attached hereto as Exhibit "B", shall be filed with the United States District Court for the Northern District of California not later than five days subsequent to action by said court with respect to said stipulation or thirty days subsequent to the filing of said stipulation, whichever is sooner.

VI. REVISED AGREEMENT

The parties agree to execute, deliver to each other concurrently herewith, and faithfully perform the Revised Agreement attached hereto as Exhibit "A". The parties further agree that said Revised Agreement shall supplant all agreements between the parties

presently existing, whether oral or written, express or implied, except as expressly set out in said Revised Agreement.

VII. JURISDICTION

It is specifically agreed by the parties hereto that jurisdiction over any action filed by either party arising out of any dispute under this Settlement Agreement (other than with respect to Exhibit "A" annexed hereto) or in connection with the Dismissal With Prejudice of the present action in the United States District Court for the Northern District of California, No. 49098, Exhibit "B" hereto, shall be vested in the United States District Court for the Northern District of California.

VIII. SUCCESSORS AND ASSIGNS

All duties under this Settlement Agreement shall be binding upon all successors, assigns, agents, subsidiaries, affiliates, parent companies, or any other associated persons whatsoever irrespective of whether said persons have obtained said status in accord with or in violation of said Revised Agreement, or otherwise.

IX. ENTIRE AGREEMENT

This Settlement Agreement, including all exhibits hereto, is entire and constitutes all of the promises and representations made by the parties herein to one another and shall constitute the sole and final agreement and disposition in the above-entitled action.

X. SEVERABILITY

Shall any paragraph, subparagraph, or provision hereof be deemed, for any reason whatsoever, to be invalid or inoperative, in whole or in part, said paragraph, sub-

paragraph or provision shall be deemed severable to the extent it is invalid or inoperative and shall not affect the force and validity of all other provisions of this Settlement Agreement or of the Revised Agreement, Exhibit "A" hereto, or of the Dismissal With Prejudice, Exhibit "B" hereto.

XI. PARAGRAPH HEADINGS

The paragraph headings of this Settlement Agreement are for convenience only, and are not part of the context hereof.

XII. EXECUTION AND EFFECTIVE DATE

This Settlement Agreement is executed on July 25, 1968, at Pebble Beach, California, and said date shall be deemed the effective date thereof.

EDWIN K. WILLIAMS & CO.

By Mrs. E. K. WILLIAMS

Mrs. E. K. Williams,
President

EDWIN K. WILLIAMS & CO.
(VA.)

By FRED G. HARRIS

Fred G. Harris,
Chairman of the Board

By WILLIAM C. McFADDEN

William C. McFadden,
President

This Settlement Agreement
is approved both in form
and content.

KEATINGE & STERLING

By RICHARD H. KEATINGE
Richard H. Keatinge

By ROBERT YALE LIBOTT
Robert Yale Libott
Attorneys for Edwin K. Williams
& Co.

NAYLOR & NEAL

By JAMES M. NAYLOR
James M. Naylor
Attorneys for Edwin K. Williams
& Co. (Va.)

REVISED AGREEMENT

I. THE PARTIES

The parties to this Agreement are EDWIN K. WILLIAMS & CO., a California corporation (hereinafter called "Williams"), and EDWIN K. WILLIAMS & Co. (VA.) (hereinafter called "Williams — East").

II. RECITALS

A. Since the year 1935, Williams and its predecessors have been engaged in the business of designing and providing bookkeeping and business management systems for oil companies and bookkeeping, business management systems and services in conjunction therewith for service station dealers. Said business has been operated under the name of Edwin K. Williams & Co. and has utilized various corporate designations, trademarks and trade names, including but not limited "Profit Guide," "Q.S.R.," "Quick Sales Recorder," "Business Analyzer," "Profit Analyzer," "S.A.S.I.," and "Serv-A-Station, Inc."

B. Since the first day of July, 1952, Fred G. Harris of Falls Church, Virginia, and his successors in interest, presently Williams — East, have been the representative in the eastern United States for the business and publications of Williams pursuant to an agreement of said date. Said agreement did "grant, bargain and sell" the "exclusive right, title and interest to sell, market and promote all bookkeeping systems, forms, books, and methods" published or used by Williams as well as any publications published or sold by Williams subsequent to that date. Said agreement further gave the predecessors of Williams — East the right to operate as an independent proprietor, and to "market and sell all bookkeeping systems, forms, services and methods under his own name, the said or other names," and to "license the bookkeep-

ing service to gasoline stations under his own name, the said name or other names," and "to have the right to set up licensees to use said bookkeeping services . . ." Pursuant to said agreement and supplementary agreements thereto as hereinafter set forth, Williams — East and its predecessors have operated said business in the eastern section of the United States up to and including the date hereof.

C. A supplemental agreement was entered into between Williams and the predecessor of Williams — East dated the second day of January, 1956, which agreement made certain alterations in the territorial rights granted under the agreement set forth in Section II. B. above.

D. An additional supplemental agreement was entered into between Williams and the predecessor of Williams — East on the first day of January, 1959. Said agreement altered certain of the territorial rights of the parties and made special provisions for certain additional commission payments in conjunction therewith.

E. At various times the parties hereto or their predecessors have entered into other agreements in connection with the territorial grant given to Fred G. Harris by the agreement of July 1, 1952, and the supplements thereto. Said agreements have been in the form of letters, or oral, or have arisen by implication through the conduct of the parties.

F. Disputes have arisen and now exist concerning the rights and obligations of the parties under the aforesaid agreements, both express and implied. Said disputes include, but are not limited to, the matters set forth in the complaint in an action brought by Williams against Williams — East and a division thereof, in the United States District Court for the Northern District of California. Said action is entitled *Edwin K. Williams & Co., a California Corporation, Plaintiff, v. Edwin K. Williams & Co. (Va.), a Virginia corporation and Staff Development Company, a Virginia corporation, Defendants,* and is No. 49098 on the docket of said court.

G. The parties hereto desire to resolve all disputes between them by means of this Revised Agreement, a Settlement Agreement which is being executed concurrently herewith, and the Dismissal With Prejudice of the aforesaid action. It is the specific intent of the parties that this Revised Agreement shall set forth all of the rights and duties of the parties in conjunction with the "Operation," as hereinafter defined, by Williams — East within the "Territory," as hereinafter defined. It is further the specific intent of the parties that this Revised Agreement shall supersede all other agreements between the parties including, but not limited to, those hereinbefore set forth.

III. DEFINITIONS

The following definitions shall be deemed applicable to all provisions of this Revised Agreement and to the rights and duties of the parties flowing therefrom:

A. *Operation* — The term "Operation" shall include all of the activities of Williams, territorial rights to which were heretofore granted to Williams — East and which are confirmed in this Revised Agreement, except as indicated herein. These include the sale, franchise and use of the services, publications, and systems developed by Williams, the licensing of licensees, the operation of branch offices, the promotion of said services, publications and systems with licensees, service stations and oil companies, the right to print forms developed by Williams, not including daily books and recap books, either directly, through a subsidiary, or otherwise, the right to make versions and derivative works based upon the publications of Williams, the right to utilize and to license others to utilize the trade names and trademarks used by Williams, and to exploit the copyrighted material

of Williams as well as other copyrighted material derived therefrom, and the right to conduct seminars and business management or sales programs in conjunction with oil company or service station management. The rights of Williams — East in regard to the Operation shall be limited to the Territory as hereinafter defined, and subject to all of the terms and conditions of this Revised Agreement.

B. *Territory* — The term "Territory" includes those portions of the continental United States to which Williams — East has obtained the rights to conduct the Operation. Said Territory is defined as the following states or portions thereof:

Alabama
Connecticut
Delaware
District of Columbia
Florida
Georgia
Indiana (limited to the counties of Harrison, Floyd and Clark)
Kentucky (with the exception of the counties of Boone, Kenton, Campbell, Daviess, Henderson and Union)
Louisiana
Maine
Maryland
Massachusetts
Mississippi
New Hampshire
New Jersey
New York
Ohio (limited to the counties of Lawrence, Gallia and Sciote)
Pennsylvania
North Carolina

Rhode Island
South Carolina
Tennessee
Vermont
Virginia
West Virginia

C. *Copyrighted Material* — The term "copyrighted material" shall include all material published by either party to which copyright notice has been affixed, whether or not said material has been deposited with the Register of Copyrights and irrespective of the validity of said notice or the copyright claimed thereby. Additionally, the term "copyrighted material" shall be deemed to include unpublished materials subject to common law copyright.

D. *Licensee* — The term "licensee" shall be defined as a person or persons obtaining the right to exercise all or part of the rights in the Operation as recognized and confirmed in this Revised Agreement, and shall include sub-branches operated by such licensee.

E. *Branch Offices* — The term "branch offices" shall include any business establishments including sub-branch offices conducted by Williams — East in connection with the Operation other than through-licensees, including but not limited to offices staffed by company employees, which perform functions identical to or substantially similar to those performed by licensees. Branch offices shall not include district offices or company divisions acting solely in advisory or executive capacities in relation to licensees and branch offices.

F. *Commissions* — The term "commissions" shall include all monies payable by either party under this Revised Agreement, as hereinafter set forth.

IV. CONSIDERATIONS

The consideration for this Revised Agreement shall be the mutual promises by, the benefits flowing to, and the detriments suffered by the parties hereto, as hereinafter set forth, including but not limited to the abandonment of such rights as each of the parties may have had under the prior agreements between the parties, as well as the execution and faithful performance of the Settlement Agreement executed by the parties concurrently herewith and the entry of the Dismissal With Prejudice of the action set forth in paragraph II. F. of this Revised Agreement.

V. GRANT OF RIGHTS

A. Subject to the terms hereof, Williams irrevocably grants in perpetuity to Williams — East exclusive rights to the Operation in the Territory, said rights to include an exclusive license within the Territory to all present and future copyrighted material of which Williams is the proprietor.

B. Subject to the terms hereof, Williams — East irrevocably grants to Williams an exclusive license to all present and future copyrighted material of which Williams — East is the proprietor, said license to be valid throughout the world except within the Territory.

C. Nothing in this Article V. or elsewhere in this Revised Agreement shall be construed to permit Williams — East to engage in the Operation, the promotion thereof or sales in conjunction therewith to the petroleum industry, oil companies, or service station management other than within the Territory. All of said rights in conjunction with the Operation throughout the world other than within the Territory shall remain vested in Williams and may be licensed, granted or assigned without restriction whatsoever. Notwithstanding the

foregoing, sales and promotional efforts may be made by either party at the national headquarters of any oil company subject to the terms of paragraph XV. hereof.

VI. OBLIGATIONS OF THE PARTIES

A. Williams — East agrees that:

(1) It will utilize its best efforts at all times to conduct and promote all phases of the Operation.

(2) That as to orders procured by Williams — East, it will instruct all oil companies within the Territory to order bookkeeping systems and books directly from Williams and to tender payment therefor directly to Williams, the price for said publications to be based on quotations in Williams' latest available price list.

(3) That it will actively solicit new licensees, install new licensees and fill present and future licensee vacancies as soon as possible.

(4) That will cooperate fully in the instruction, supervision and promotion of licensee operations to the benefit of both parties.

(5) That it will employ and compensate all persons engaged in the Operation and pay all expenses incurred therein.

(6) That it will promptly inform Williams of all persons, firms or corporations desiring to purchase publications or otherwise utilize the services provided by Williams outside the Territory.

(7) That it will promptly pay all commissions due to Williams under the terms hereof.

(8) That will conduct and maintain an active promotional program in conjunction with the Operation; such program may include trade advertising and the holding

of seminars and other management training programs for oil company personnel.

(9) That it will, upon publication of new books and materials, divulge the same to Williams by copies to the end that Williams shall be kept currently informed relative to available books and materials.

B. Williams agrees that:

(1) It will fill promptly all orders for bookeeping systems and books obtained by Williams — East, including orders of oil companies in Williams — East's Territory, of Williams — East licensees, of branch offices and of Williams — East itself.

(2) That it will promptly inform Williams — East of all persons, firms or corporations desiring to utilize any facet of the Operation within the Territory.

(3) That it will promptly pay all commissions due to Williams — East under the terms hereof.

(4) That it will conduct and maintain an active promotion program; such program may include trade advertising and the holding of seminars and other management training programs for oil company personnel.

(5) That it will, upon publication of new books and materials, divulge the same to Williams — East by copies to the end that Williams — East shall be kept currently informed relative to available books and materials.

VII. CORPORATE AND TRADE NAMES

A. Williams — East agrees that within thirty days of the date of the execution hereof, it will commence and promptly proceed with the necessary legal steps to change

its corporate name from Edwin K. Williams & Co. (Va.) to Edwin K. Williams & Co. — East.

B. Williams — East further agrees that on all letterheads, publications, brochures, business cards and advertising materials the name of Williams — East will be presented in the following fashion:

Edwin K. Williams & Co. — East
Eastern Representative
Edwin K. Williams & Co.

C. Williams — East agrees that it will carry on all activities in conjunction with the Operation under the corporate name of Edwin K. Williams & Co. — East, and wherever practicable, utilize the designation set forth in Subparagraph B. of this Article VII.

D. Williams — East agrees that should it enter into any activities not related to the Operation, the petroleum industry, oil companies or service stations, it will act through a separate corporation, the name of said corporation shall not contain the name Edwin K. Williams or any contraction or abbreviation thereof, nor shall the name of Edwin K. Williams, any trade names used in connection there with or any trademark used in connection therewith, either by Williams or by Williams — East be used in conjunction with said activities.

VIII. COMMISSIONS

A. Commencing with the date hereof, Williams shall pay to Williams — East a sum equal to thirty percent (30%) of the total amount received (less freight costs for shipping) of all Bookkeeping Systems and Books sold by Williams — East within the Territory. This shall include all Bookkeeping Systems and Books sold by Williams — East to oil companies headquartered within the Territory regardless of where delivered, but shall otherwise be

limited to Bookkeeping Systems and Books delivered to persons, firms or corporations within the Territory.

B. In addition to the foregoing, Williams shall pay to Williams — East a sum equal to fifteen percent (15%) of all gross billings made by Williams to the Cities Service Oil Company of Delaware (now by change of name Cities Service Oil Co.) and to the Standard Oil Company of Indiana (now by change of name American Oil Company).

C. Williams agrees to sell to Williams — East all bookkeeping systems and books directly ordered by Williams — East at a discount of thirty percent (30%) from the retail price, on a 30-day net basis, plus freight.

D. Williams — East agrees to pay to Williams a sum equal to thirty percent (30%) of the gross monthly revenue received from the licensees of Williams — East as defined in paragraph III. D. and from the branch offices of Williams — East as defined in paragraph III. E. With respect to each branch office as defined in paragraph III. E., the payment basis for said branch office shall be the same percentage of gross revenues which said branch office would have paid to Williams — East had said branch office been operated by an independent licensee as defined in paragraph III. D.

IX. REPORTS AND TIME OF PAYMENTS

The parties agree that the commissions set forth in Article VIII. hereof shall be due and payable on the fifteenth day of each month, said payments to be based upon actual cash receipts as of the 25th day of the preceding month. The parties further agree that said payments shall be accompanied by reports showing in reasonable detail the basis for said payments, such as, for example, an IBM run, showing accounts broken down as to oil companies.

X. AUDITS AND INSPECTIONS

The parties hereto agree to keep books, records and accounts in connection with the Operation, and all commissions payable thereunder. At the request of either party, said party shall, at its sole expense, have the right to inspect or audit said books and records during ordinary business hours, and upon reasonable notice, as may be necessary:

(1) To determine, in respect of any reporting period ending not more than two years prior to the date of such request, the correctness of any report or payment under this Revised Agreement, or

(2) To obtain in respect of any reporting period ending not more than two years prior to the date of such request, information as to commissions payable in the event that no report or payment has been made pursuant to this Revised Agreement.

XI. COPYRIGHT

A. The parties agree that as soon as practicable a copyright manual will be devised for the use of the parties by respective counsel, each party bearing the expense of its own counsel in this connection. Said copyright management system is to include a system for the publications of copyright notice, the filing for claims of copyright with the Register of Copyrights, and the maintenance of adequate records thereof. It is further agreed that all Copyrighted Material belonging to either party shall be sent to the other party as soon as practicable. It is further agreed that each party will inform the other of all claims of copyright and any negative action, if any, taken thereon by the copyright office.

B. In the event that at any time either party learns of infringing publications by any third party of the copyrighted material belonging to either party, said party

shall promptly inform the party which is the proprietor of said copyright of said infringement, together with any facts available concerning it. The proprietor of said copyright shall thereupon promptly take all action necessary, including, but not limited to, the filing of a lawsuit in the appropriate court to protect the interests of the parties in said copyrighted material. The parties agree that if an action is filed under the provisions of this Article XI. B., said action will be prosecuted diligently, either to judgment or to settlement.

C. The obligations of each of the parties in connection with third party infringement of the copyrights of either party as set forth in Section XI. B. shall be identical in the event that the discovery of said infringement is made by the party which is the proprietor of said copyright.

D. Each party agrees to provide full cooperation in all actions to protect the interests of the parties in the copyrighted material including but not limited to lawsuits brought by the party which is the copyright proprietor.

E. Williams — East agrees that it will not voluntarily contest, directly or indirectly, the validity of any of the copyrights heretofore or hereafter vested in Williams, nor voluntarily assist others, directly or indirectly, in infringing said copyrights, or in the defense of any suit which may be brought for the infringement of said copyrights.

F. Except insofar as publications bearing copyright notices in the name of Williams — East, a subsidiary, division, or trade style thereof, shall purport to claim copyright on materials properly vested in Williams, Williams agrees it will not voluntarily contest, directly or indirectly, the validity of any copyrights of which Willams — East is the proprietor, or voluntarily assist others, directly or indirectly, in infringing said copyrights, or in the defense of any suit which may be brought for the infringement of said copyrights.

XII. SEMINARS AND TRAINING PROGRAMS

A. All seminars and training programs, including business management programs and sales training programs for the petroleum industry, oil companies, service station operators and licensees conducted within the Territory shall be conducted by Williams — East.

B. All seminars and training programs, including business management programs and sales training programs for the petroleum industry, oil companies, service station operators and licensees conducted outside the Territory shall be conducted by Williams.

C. Williams agrees that if any seminar or other management training program presented by it contains all or substantially all of the material prepaid for a seminar or training program by Williams — East, exclusive of materials previously published by or owned by Williams and of materials available to Williams from other sources, including but not limited to materials in the public domain, Williams will pay to Williams — East a sum equal to ten percent (10%) of the tuition fees, but excluding expenses other than tuition paid by the oil company for whom said seminar is being conducted.

D. Williams — East agrees that if any seminar or other management training program presented by it contains all or substantially all of the material prepared for a seminar or training program by Williams, exclusive of materials previously published by or owned by Williams — East and of materials available to Williams — East from other sources, including, but not limited to materials in the public domain, Williams — East will pay to Williams a sum equal to ten percent (10%) of the tuition fees, but excluding expenses other than tuition paid by the oil company for whom said seminar is being conducted.

E. Notwithstanding the foregoing paragraph XII. C., it is understood between the parties that no more than two experts in management training procedures from Williams will examine the materials, methods and profit potential of the seminars as presented by Williams — East. If, in the good faith judgment of said person or persons, the value of the material and know-how to be provided by Williams — East and the profit potential shall justify an increase in payment, Williams will agree to pay to Williams — East a sum equal to fifteen percent (15%) of the tuition fees received under all of the other terms and conditions of Article XII. C. preceding.

XIII. TERMINATION

A. If Williams — East shall at any time fail to make any payment as herein provided, Williams, in addition to all other rights and remedies it may have, may terminate this Revised Agreement upon not less than sixty days' prior notice to Williams — East. If Williams — East shall correct such default during such sixty-day period, the notice shall be of no further force and effect. If said default shall not be corrected within said sixty-day period, this Revised Agreement shall terminate and all rights to the Territory revert to Williams 120 days from the date of said notice.

B. If Williams — East shall go into liquidation, or if a receiver or trustee be appointed for the property or estate of Williams — East or if Williams — East makes an assignment for the benefit of creditors, whether any of the aforesaid events be the outcome of a voluntary act of Williams — East or otherwise, Williams may terminate this Revised Agreement forthwith by giving notice to such effect, and such notice shall be effective immediately.

C. Termination of this Revised Agreement shall be without prejudice to the rights of the parties to receive

all commissions accrued and unpaid on the effective date of such termination and to any other remedies which either party may then or thereafter have hereunder or otherwise.

XIV. CONTINUITY OF INTEREST AND SUCCESSION

A. It is agreed between the parties that the control of each company shall continue to be vested in persons who are or shall become active in the operations thereof. In order to effect this end, it is agreed that within six months from the effective date hereof each party will enter into a stock purchase agreement providing:

(1) that in the event of the death of any stockholder owning more than five percent (5%) of the stock, the corporation shall have the right to buy all capital stock in excess of five percent (5%), and if said right is not exercised by the corporation, that right shall be vested in other stockholders who are officers or directors active in the operation of said corporation, and if none of said officers or directors exercise said right, that right shall be vested in the other party hereto;

(2) in the event that any owner of more than five percent (5%) of the stock of either corporation desires to dispose of said stock, a similar agreement for the purchase of all stock in excess of five percent (5%) of the capital stock of said corporation shall be entered into, the continuity of said rights of purchase to be identical with (1) above and the price of said purchase to be either the amount tendered in any bona fide offer as a result of an arm's length transaction with a third party, or, in the event there shall be no such bona fide offer, the appraised value of said stock.

B. Notwithstanding the foregoing, nothing in this Article XIV. shall be deemed to prevent a bona fide

public offering of the capital stock of either corporation or of both corporations provided that such offering does not include an amount of capital stock which would give effective control of said corporation or corporations to persons other than officers and directors thereof who are actively engaged in the business of said corporation.

XV. COOPERATION AND COORDINATION

A. The parties agree to cooperate to the fullest extent possible to further the operation and the welfare and development of business and goodwill for both of the parties hereto.

B. In conjunction with said cooperation, the parties agree to coordinate dealings with oil companies in the following manner:

(1) In the event that any representative of Williams — East has reason to call on the headquarters of any oil company which is located outside the Territory, said call being concerned with service to be provided within the Territory, said representative will give reasonable notice of such proposed call to the regional manager of Williams in the area where said oil company office is located and give said regional manager the opportunity to be present at said call, or, at his sole option, to have another representative of Williams present at said call.

(2) In the event that any representative of Williams has reason to call on the headquarters of an oil company which is located within the Territory, said call being concerned with service to be provided outside the Territory, said representative will give reasonable notice of such proposed call to the regional manager of Williams — East in the area where said oil company office is located and give said regional manager the opportunity to be present at said call, or, at his sole

option, to have another representative of Williams — East present at said call.

C. Nothing in this Article XV. shall be deemed to restrict representatives of Williams from calling on international and foreign marketing personnel of oil companies headquartered within the Territory when such call deals solely with publications and services to be provided outside of the continental United States.

D. In order to facilitate cooperation in the servicing of oil companies, the parties agree that copies of all letters to and from oil companies concerning matters within the Territory which are written or received by Williams will be provided promptly to Williams — East and copies of all letters to and from the oil companies concerning matters outside the Territory which are written or received by Williams — East will be provided promptly to Williams.

XVI. STANDARDIZATION AND STEERING COMMITTEE

It is the desire of the parties to standardize all external forms and procedures used throughout the United States by Williams and Williams — East. To effect said standardization a Steering Committee will be established within ninety days of the effective date hereof consisting of not more than two representativees of each of the parties hereto. It is further agreed that insofar as possible, all licensee agreements made by Williams — East will be identical with the licensee agreements made by Williams with its own licensees.

XVII. UNIQUE NATURE OF AGREEMENT

The parties hereto agree and acknowledge that the rights conveyed to Williams — East by this Revised Agreement are of a unique and special nature and that

neither party will have an adequate remedy at law in the event of the failure of the other party to abide by the terms and conditions of this Revised Agreement other than the terms and conditions involving the payment of commissions, nor will money damages adequately compensate for such injury. It is, therefore, agreed between the parties that for any violation of the terms and conditions of this Revised Agreement a restraining order or an injunction may issue or a decree of specific performance be ordered by a court of equity in addition to any other rights and remedies which the injured party may have at law or in equity.

XVIII. NOTICES

All notices and reports provided for in this Revised Agreement shall be in writing and shall be considered delivered when deposited in the United States mail, certified or registered, return receipt requested, postage prepaid, to the following addresses:

To Williams: Edwin K. Williams & Co.
3888 State Street
Santa Barbara, Calif. 93105

To Williams — East: Edwin K. Williams
& Co. — East
207 Park Avenue
Falls Church, Va. 22046

XIX. LAW TO GOVERN

This Revised Agreement shall be construed and the respective rights of the parties hereto determined according to the laws of the State of California.

XX. CONFLICT OF PROVISIONS

If any provision of this Revised Agreement shall in any way be deemed to conflict with any provision, covenant,

condition or proviso whatsover in the Settlement Agreement executed concurrently herewith, the provisions of this Revised Agreement shall be deemed controlling.

XXI. ASSIGNABILITY

This Revised Agreement shall not be assignable by either party without the written consent of the other party except in the event of a statutory merger or reorganization of either party under the provisions of Section 368 of the Internal Revenue Code, provided, however, that no such merger or reorganization shall alter the control of the company or the continuity of interest or succession thereto as set forth in Article XIII. hereof. When duly assigned in accordance herewith, this Revised Agreement shall be binding upon and inure to the benefit of the assignee

XXII. WARRANTY

Williams warrants and represents that, exclusive of the prior agreements between the parties hereto which are superseded by this Revised Agreement, Williams owns the entire right, title and interest in the Operation and has the unrestricted right to enter into this Revised Agreement, and has not granted or otherwise conveyed any interest in or rights under said Operation including, but not limited to, the copyrighted material conveyed hereby to any other person or entity whatsoever.

XXIII. ENTIRE AGREEMENT

This Revised Agreement is entire and constitutes all of the promises and representations made by the parties herein to one another.

XXIV. SEVERABILITY

Should any paragraph, subparagraph or provision hereof be deemed, for any reason whatsoever, to be invalid or inoperative, said paragraph, subparagraph or provision shall be deemed severable and shall not affect the force and validity of all other provisions of this Revised Agreement.

XXV. INDEPENDENCE OF PARTIES

No provision of this Revised Agreement, express or implied, shall be deemed to establish a joint venture, partnership, or agency relationship between the parties. Williams — East shall operate as an independent proprietor, and Williams shall not be liable for any bills or indebtedness of any nature incurred by Williams — East, nor shall Williams — East be liable for any bills or indebtedness of any nature incurred by Williams. Neither party shall be liable for any of the acts of the other party including but not limited to the assumption of contractual obligations or any acts resulting in legal liabilities of any kind with respect to third parties including but not limited to any monetary recoveries which may be made by third parties as a result thereof.

XXVI. PRIOR AGREEMENTS

All prior agreements between the parties, including all agreements set forth in Article II. hereof, are hereby terminated and superseded in their entirety by this Revised Agreement.

XXVII. HEADINGS

The paragraph headings hereof are for convenience only and are not part of the context.

XXVIII. EXECUTION AND EFFECTIVE DATE

This Revised Agreement is executed on July 25, 1968, and that shall be deemed the effective date thereof.

EDWIN K. WILLIAMS & CO.

By Mrs. E. K. WILLIAMS

Mrs. E. K. Williams,
President

EDWIN K. WILLIAMS & CO. (VA.)

By FRED G. HARRIS

Fred G. Harris,
Chairman of the Board

By WILLIAM C. McFADDEN

William C. McFadden,
President

This Agreement is approved
both in form and content.

KEATINGE & STERLING

By RICHARD H. KEATINGE

Richard H. Keatinge

By ROBERT YALE LIBOTT

Robert Yale Libott
Attorneys for Edwin K. Williams & Co.

NAYLOR & NEAL

By JAMES M. NAYLOR

Attorneys for Edwin K. Williams & Co. (Va.)

STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

Ernest Cook , being first duly sworn deposes and says:

That affiant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years, and not a party to or interested in the within action; that affiant's business address is 1706 Maple Avenue, Los Angeles, California, 90015.

That on January 28, 1977 affiant caused a courier to forward the within brief to be served on January 31, 1977 and forward by mail the within

Brief for Respondents in Opposition upon the following:

By Courier

United States Supreme Court — 1 original plus
United States Supreme Court Building — 40 copies
1st Avenue, N.E.
Washington, D. C. 20543

By Mail

Raymond Fisher, Esq. — 3 copies
Tuttle & Taylor
606 South Grand Avenue
Los Angeles, California 90017

That there is a regular communication by mail between the place of mailing and the place so addressed.

Ernest Cook

Subscribed and sworn to before me
this 28th day of January, 1977

Rita Korney

Notary Public in and for the
State of California

OFFICIAL SEAL
RITA KORNEY
NOTARY PUBLIC—CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires October 7, 1980